

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 23 May 2006

CASE NOS: 2005-BLA-05887
2005-BLA-05888

In the Matter of

CLAUDETTE WINSTON, widow,
WILLIE M. WINSTON, deceased,

Claimants

v.

PITTSBURGH & MIDWAY,
Employer

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-in-interest.

Appearances: Thomas E. Johnson for the Claimant
John W. Hargrove for the Employer

Before: **PAUL H. TEITLER**
Administrative Law Judge

DECISION AND ORDER

This proceeding arises from a claim for benefits under 30 U.S.C. §§901-945 (the Act). In accordance with the Act and the regulations issued thereunder, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a formal hearing.

This claim was brought by the miner, who is now deceased. His claim and his wife's survivor claim are consolidated in this proceeding. Benefits under the Act are awardable to persons who are totally disabled within the meaning of the Act due to pneumoconiosis. Benefits are also awardable to the survivors of miners whose death was caused by pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment, and it is commonly known as black lung.

The instant matter is the result of the Employer, Pittsburgh & Midway, appealing a determination by the District Director that granted Claimant's modification request of the living miner's claim. A hearing was held before me in Birmingham, Alabama on February 15, 2006.

SUMMARY OF CLAIMANT'S TESTIMONY

Claudette Winston testified at the hearing held on February 15, 2006. Her husband worked as a belt patrolman, keeping the beltline clear, shoveling coal, lifting fifty pound bags or rock dust, and rock dusting. (T 126).¹ She testified that her husband began seeing Dr. Moss in 1989. He had to sleep with two pillows at night to help him breathe. (T 124). Mrs. Winston became a nurse in 1991, at which time she began listening to her husband's chest and heard wheezing consistent with a chronic lung disease. She listened to his chest approximately three times a year. (T 125).

STIPULATIONS

The parties have stipulated to twenty-five years three months (25 ¼) years of coal mine employment.

ISSUES

- (1) Whether Miner had pneumoconiosis,
- (2) Whether Miner's pneumoconiosis arose out of his coal mine employment,
- (3) Whether Miner was totally disabled due to pneumoconiosis,
- (4) Whether Miner's death was caused by pneumoconiosis.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Entitlement to benefits under 20 C.F.R. §718 depends upon the proof of three elements. The miner must establish pneumoconiosis, that it arose out of his coal mine employment, and that he is totally disabled due to pneumoconiosis. Entitlement under Part 718 for a survivor's claim depends upon whether a miner's death was due to pneumoconiosis. 20 C.F.R. § 718.205(a).

Section 7(c) of the Administrative Procedure Act imposes the burden of persuasion on the party seeking the rule, in this case, Claimant. Section 7(c) also requires a claimant to meet his burden by a preponderance of the evidence, not by clear and convincing evidence.

¹ The following abbreviations are used throughout: "T" refers to the transcript of the hearing held in Birmingham, Alabama on February 15, 2006, "CX" refers to the Claimant's exhibits, "EX" refers to the Employer's exhibits, and "DX" refers to the Director's exhibits.

Accordingly, if the evidence is evenly balanced, Claimant must lose. Director, OWCP v. Greenwich Collieries, 512 U.S.267 (1994).

(1) Presence of pneumoconiosis

Section 718.202(a) sets forth four alternate methods for determining the existence of pneumoconiosis. Pursuant to §718.202, the claimant can demonstrate pneumoconiosis by means of 1) x-rays interpreted as positive for the disease, or 2) biopsy or autopsy evidence, or 3) the presumptions described in §§718.304, 718.305, or 718.306, if found to be applicable, or 4) a reasoned medical opinion which concludes the presence of the disease, if the opinion is based on objective medical evidence such as pulmonary function studies, arterial blood gas tests, physical examinations, and medical and work histories.

Chest X-ray Evidence

Under §718.202(a)(1), a finding of the presence of pneumoconiosis may be based upon a chest x-ray conducted and classified in accordance with §718.102. To establish the existence of pneumoconiosis, a chest x-ray must be classified as category 1, 2, 3, A, B, or C, according to the ILO-U/C classification system. A chest x-ray classified as category 0, including subcategories 0/1, 0/0, or 0/-, does not constitute evidence of pneumoconiosis.

Chest x-ray interpretations, relevant to the determination of whether Claimant has pneumoconiosis, were submitted into evidence. The following is a list of admissible x-ray readings and the names and qualifications of the interpreting physicians.

| DATE OF X-RAY | EX. NO. | PHYSICIAN | RADIOLOGICAL CREDENTIALS | READING |
|----------------------|----------------|------------------|---------------------------------|----------------|
| 6/17/04 | EX 1 | Dr. Goldstein | B | No CWP |
| 6/17/04 | CX 10 | Dr. Cappiello | B, BCR | Unreadable |
| 1/7/04 | EX 4 | Dr. Goldstein | B | 1/1 |
| 1/7/04 | CX 1 | Dr. Ahmed | B, BCR | 3/2 |
| 12/10/02 | EX 5 | Dr. Goldstein | B | 1/2 |
| 12/10/02 | CX 2 | Dr. Ahmed | B, BCR | 3/2 |
| 12/10/02 | DX 12 | Dr. Westerman | | 1/1 |
| 10/2/02 | EX 2 | Dr. Goldstein | B | 1/2 |
| 10/2/02 | CX 9 | Dr. Cappiello | B, BCR | 2/2 |
| 12/9/96 | EX 3 | Dr. Goldstein | B | Negative |
| 12/9/96 | CX 3 | Dr. Ahmed | B, BCR | 2/2 |

Under Part 718, where the x-ray evidence is in conflict, consideration shall be given to the readers' radiological qualifications. Dixon v. North Camp Coal Co., 8 BLR 1-344 (1985). The administrative law judge may assign more weight to the x-ray interpretation of a B-reader. Aimone v. Morrison Knudson Co., 8 BLR 1-32 (19 85); Vance v. Eastern Associated Coal Corp., 8 BLR 1-69 (1985). The Benefits Review Board held the interpretation of an x-ray by a physician who is a board-certified radiologist as well as a B-reader may be given more weight than the interpretation of a physician who is only a B-reader. Scheckler v. Clinchfield Coal Co., 7 BLR 1-128 (1984).

There are five x-rays that were reviewed in this case. Dr. Afzal Ahmed, a board certified radiologist and B-reader, interpreted three chest x-rays. (CX 1-3). Dr. Ahmed found abnormalities consistent with pneumoconiosis on all three x-rays. The first x-ray is from 1996 and was reviewed by Dr. Ahmed, who found pneumoconiosis with a profusion of 2/2. (CX 3). He made similar findings on x-rays from 2002 and 2004. His findings evidence both rounded and linear opacities in the upper, middle and lower zones of the x-ray. (CX 1, 2, 3). Dr. Goldstein read the same x-rays. Dr. Goldstein found the 1996 x-ray to be negative. (EX 3). Dr. Goldstein found the October 2002 x-ray to have a profusion of 1/2, but indicates that the opacities are linear and found in the lower regions of the lung. He makes the same findings on an x-ray taken in December 2002, again indicating no abnormalities consistent with pneumoconiosis. I give greater weight to the readings by Dr. Ahmed, a dually qualified B-reader and board certified radiologist.

Dr. Cappiello, also dually qualified, read two x-rays dated October 2, 2002 and June 17, 2004. Dr. Cappiello found the first x-ray exhibited both rounded and linear opacities in the four lower lung zones, and marked that the findings were not consistent with pneumoconiosis. However, in the attached letter, Dr. Cappiello writes his impression as being pneumoconiosis category 2/2 in the lower four zones. Dr. Cappiello read the latter x-ray as being unreadable. Based upon the superior qualifications of Dr. Cappiello, I accord greater weight to his finding that this x-ray is unreadable, than Dr. Goldstein's finding that it is negative.

There are several x-rays in the present case with ILO classifications meeting the standard for a finding of pneumoconiosis, and inadequate evidence to the contrary. Therefore, I find that the miner has established the existence of pneumoconiosis on the basis of x-ray evidence.

Medical Opinion

The determination of pneumoconiosis may be made by a physician, notwithstanding a negative chest x-ray, if his opinion is reasoned and supported by objective medical evidence such as pulmonary function tests and blood gas studies. 20 C.F.R. §718.202(a)(4)(2000) and (2001). An opinion is well-documented and reasoned when it is based on evidence such as physical examinations, symptoms, and other adequate data that support the physician's conclusions. See Fields v. Island Creek Coal Co., 10 B.L.R. 1-19 (1987); Hess v. Clinchfield Coal Co., 7 B.L.R. 1-295 (1984).

There are three medical opinions in evidence, those of Drs. Cohen, Moss and Bailey. (CX 6a, CX 6b, CX 7, CX 7b). Dr. Cohen is a B-reader and board certified in internal medicine. He is the Senior Attending Physician of pulmonary medicine at Stroger Hospital and Professor of Occupational Health at the University of Illinois. Dr. Cohen is currently the Principal Investigator on a project that studies respiratory disease in coal mining populations in the Ukraine. Dr. Cohen submitted a medical opinion (CX 6a), and a supplemental opinion (CX 6b). Dr. Cohen reviewed Mr. Winston's medical records and concluded that he suffered from CWP. He states that Mr. Winston began complaining of dyspnea in 1996. Wheezing, crackles and rales were observed in the miner. Dr. Westerman noted wheezing attacks beginning in 2000. Dr. Cohen also relied on Mr. Winston's tests. Dr. Cohen states that the only valid PFT, taken on February 25, 2000, showed substantial impairment of diffusion, not an obstructive pattern. ABGs showed significant resting and exercise gas abnormalities. Chest x-rays and CT scans showed significant pulmonary fibrosis, which is inconsistent with Dr. Bailey's finding of UIP. Dr. Cohen also disputes Dr. Bailey's finding that irregular opacities are inconsistent with CWP; Dr. Cohen states that they can be found with CWP.

Dr. Moss is board certified in internal medicine. He treated Mr. Winston approximately twice a year from 1989 until his death in 2004. Dr. Moss wrote a medical opinion submitted as CX 7. He stated that Mr. Winston suffered from interstitial pulmonary fibrosis as the result of his pneumoconiosis, which arose out of coal mine dust exposure. He based this finding upon chest x-rays from as early as 1993 which showed fibrosis, as well as a reduced diffusing capacity. Dr. Moss stated that Mr. Winston first complained to him of dyspnea in 1996. Dr. Moss stated that Mr. Winston suffered from a progressive lung disease with severe hypoxemia, as evidenced in a 2002 ABG test in which Mr. Winston's pO₂ fell from 69.9 to 56 with exercise. By January 2004, Mr. Winston's pO₂ at rest was 52.7. CT scans taken in 2003 and 2004 showed worsening interstitial pulmonary fibrosis.

Dr. Bailey is board certified in internal medicine and pulmonary disease and is the Director of the Lung Health Center at University of Alabama. Dr. Bailey testified at the hearing held on February 15, 2006. He testified that he believed Mr. Winston had usual interstitial pneumoconiosis ("UIP"), not coal worker's pneumoconiosis ("CWP"). Dr. Bailey explained that the patterns present on Mr. Winston's x-rays showed linear and irregular opacities with a honeycombing effect, indicative of UIP. (T 39). Dr. Bailey stated, however, that it is possible to have only irregular opacities and have CWP. (T 100). While the cause of UIP is unknown, its only risk factors are smoking, occupational and environmental, but not CWP. (T 40-41). Dr. Bailey found that the only risk factor present in Mr. Winston's case was smoking. (T 40-41). Unlike UIP, CWP usually produces rounded opacities that begin in the upper lobes and is slowly progressive. Dr. Bailey explained that here there were linear opacities that began in the lower lobes and a rapid progression. (T 42-43). He also stated that Mr. Winston had chronic obstructive pulmonary disease ("COPD") caused by smoking. (T 42). He concluded that Mr. Winston died due to respiratory failure complicated by UIP and COPD. (T 43).

Dr. Bailey testified to what amounts to a finding of legal pneumoconiosis as defined in 20 C.F.R. 718.201(a)(2).

Dr. Bailey: Well, you know I think in terms of trying to be as analytical as possible I, he had chronic obstructive pulmonary disease ...

Judge Teitler: And he's got 25 years of working in ...

...
Dr. Bailey: And, so, in a dusty environment if you have COPD

It can certainly aggravate exacerbations, dust exposure can aggravate exacerbations and would account for increase frequency of, you know, problems with infection and the need for antibiotics. And the kind of thing that we saw where his FVC was down low, FEV 1 both several years before and I think that was related to an exacerbation.

[T 116-117]

While I think all three medical opinions are well reasoned, I find that the weight of the evidence supports Dr. Cohen's and Dr. Moss' finding of pneumoconiosis. First, there were several x-rays that indicated rounded opacities, including one read by Dr. Ahmed from 1996 that found opacities in the upper region of the lung. This early of a finding of opacities in the upper lung is inconsistent with Dr. Bailey's reasoning that Mr. Winston's disease rapidly progressed in the last few years of his life. Both Drs. Cohen and Moss found significant fibrosis and reduced diffusing capacity. These findings of Drs. Cohen and Moss, combined with the explanation by Dr. Bailey that describes a finding of legal pneumoconiosis, leads me to conclude that the miner did suffer from pneumoconiosis.

Therefore, I find that the miner has established the existence of pneumoconiosis on the basis of medical opinion.

(2) Arose out of coal mine employment

In addition to establishing the existence of pneumoconiosis, a miner must also establish his pneumoconiosis arose, at least in part, out of his coal mine employment. Pursuant to §718.203(b), a miner is entitled to a rebuttable presumption of a causal relationship between his pneumoconiosis and his coal mine employment if he worked for at least ten (10) years as a coal miner. In the instant case, Mr. Winston established over twenty-five (25) years of coal mine employment.

Employer offered evidence to show that Mr. Winston did not have pneumoconiosis, but rather had UIP and COPD secondary to smoking. However, as it has been established that Mr. Winston did have pneumoconiosis, I find that the presumption concerning the pneumoconiosis has not been rebutted. Employer has stipulated to the fact that Mr. Winston worked as a coal miner for 25 years, the bulk of his working life. As the presumption of the causal relationship has not been rebutted, I find that the miner's pneumoconiosis arose out of his coal mine employment.

(3) Total disability

Claimant must establish that he is totally disabled due to a respiratory or pulmonary condition. Section 718.204(b)(1) provides as follows:

[A] miner shall be considered totally disabled if the miner has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner

- (i) From performing his or her usual coal mine work; and
- (ii) From engaging in gainful employment . . . in a mine or mines . . .

§ 718.204(b)(1).

Nonpulmonary and nonrespiratory conditions which cause an “independent disability unrelated to the miner’s pulmonary or respiratory disability” have no bearing on total disability under the Act. § 718.204(a); see also, Beatty v. Danri Corp., 16 B.L.R. 1-1 (1991), aff’d as Beatty v. Danri Corp. & Triangle Enterprises, 49 F.3d 993 (3d Cir. 1995).

Claimant may establish total disability in one of four ways: pulmonary function study; arterial blood gas study; evidence of cor pulmonale with right-sided congestive heart failure; or reasoned medical opinion. § 718.204(b)(2)(i-iv). Producing evidence under one of these four ways will create a presumption of total disability only in the absence of contrary evidence of greater weight. Gee v. W.G. Moore & Sons, 9 B.L.R. 1-4 (1986). All medical evidence relevant to the question of total disability must be weighed, like and unlike together, with Claimant bearing the burden of establishing total disability by a preponderance of the evidence. Rafferty v. Jones & Laughlin Steel Corp., 9 B.L.R. 1-231 (1987).

Claimant must establish that his total disability is due to pneumoconiosis. This element of entitlement is established if pneumoconiosis, as defined in Section 718.201, is a substantially contributing cause of the miner’s totally disabling respiratory or pulmonary impairment. Section 718.204(c)(1); Bonessa v. United States Steel Corp., 884 F.2d 726 (3d Cir. 1989).

Pulmonary Function Tests

In order to establish total disability through pulmonary function tests, the FEV₁ must be equal to or less than the values listed in Table B1 of Appendix B to this part and, in addition, the tests must also reveal either: (1) values equal to or less than those listed in Table B3 for the FVC test, or (2) values equal to or less than those listed in Table B5 for the MVV test or, (3) a percentage of 55 or less when the results of the FEV₁ test are divided by the results of the FVC tests. § 718.204(b)(2)(i)(A-C). Such studies are designated as “qualifying” under the regulations. Assessment of pulmonary function study results is dependent on Claimant’s height, which on average was noted to be 69 inches. I therefore used that height in evaluating the studies. Protopappas v. Director, OWCP, 6 B.L.R. 1-221 (1983).

The current record contains the pulmonary function studies summarized below.

| DATE | EX. NO. | PHYSICIAN | AGE/ HEIGHT | FEV ₁ | FVC | MVV | FEV ₁ / FVC | QUALIFIES |
|----------|---------|------------------|----------------|------------------|--------------|----------|---------------------------|-------------|
| 3/30/04 | DX 20 | Dr. Stephen | 64/69 | 1.71 1.72 | 2.05 1.96 | 56 | 83% | Not valid |
| 4/29/03 | DX 24 | Dr. Moss | 63/69 | 2.33 2.27 | 2.89 2.81 | 93 75 | 81% 81% | Not valid |
| 12/10/02 | DX 12 | Dr. Westerman | 62/69 | 2.14 | 2.88 | 66 | 74% | |
| 6/19/02 | DX 20 | Dr. Stephen | | 2.42 | 3.09 | | 78% | No tracings |
| 2/25/00 | CX 8 | Dr. Moss | 60/69 | 2.72 | 3.44 | 82 | 79% | Validated |
| 6/5/96 | CX 8 | Dr. Moss | 56/69 | 2.71 | 2.95 | 97 | 91% | Not valid |

The only validated test, conducted on February 25, 2000, did not yield qualifying results. Other tests were invalidated due to poor effort or the absence of tracings. Accordingly, I can not find that the miner was total disabled on the basis of pulmonary function tests.

Arterial Blood Gas Studies

The current record contains the arterial blood gas studies summarized below.

| DATE | EX. NO. | PHYSICIAN | PCO ₂ | PO ₂ | QUALIFIES |
|----------|---------|------------------|------------------|-----------------|--------------------|
| 1/6/04 | DX 20 | Dr. Newsome | 38.7 | 52.7 | YES |
| 12/10/02 | DX 12 | Dr. Westerman | 37.1 39.4* | 69.9 56* | YES, post-exercise |

*post-exercise

Arterial blood gas tests, unlike pulmonary function test, are not effort dependent. Here, there is one qualifying test, and another test that shows qualifying results post-exercise. These numbers are consistent with someone who has pneumoconiosis as the PO₂ levels tend to drop post-exercise. Since there are two qualifying test results, I find that the miner has established total disability under the provisions of § 718.204(b)(2)(ii).

Cor Pulmonale

Under § 718.204(b)(2)(iii), total disability can also be established where the miner had pneumoconiosis and the medical evidence shows that he suffers from cor pulmonale with right-sided congestive heart failure. There is no record evidence of cor pulmonale with right-sided congestive heart failure. Accordingly, total disability has not been established pursuant to 20 C.F.R. § 718.204(b)(2)(iii).

Medical Opinion

The remaining means of establishing total disability is with the reasoned medical judgment of a physician that a miner's respiratory or pulmonary condition prevents him from engaging in his usual coal mine work or comparable and gainful work. Such an opinion must be based on medically acceptable clinical and laboratory diagnostic techniques. § 718.204(b)(2)(iv).

An opinion is well-documented and reasoned when it is based on evidence such as physical examinations, symptoms, and other adequate data that support the physician's conclusions. See Fields v. Island Creek Coal Co., 10 B.L.R. 1-19 (1987); Hess v. Clinchfield Coal Co., 7 B.L.R. 1-295 (1984). A medical opinion that is undocumented or unreasoned may be given little or no weight. Clark v. Karst-Robbins Coal Co., 12 B.L.R. 1-149 (1989); see also Duke v. Director, OWCP, 6 B.L.R. 1-673 (1983) (a report is properly discredited where the physician does not explain how the underlying documentation supports his or her diagnosis).

There are three medical opinions in the record. Dr. Cohen found that the miner would be unable to perform his last coal mining job due to pneumoconiosis. Likewise, Dr. Moss stated that he had no doubt that Mr. Winston was rendered totally disabled due to his chronic respiratory disease, pointing to the January 6, 2004 ABG where the miner's PO₂ was 52.7 at rest. Dr. Bailey opined that any disability was the result not of coal workers pneumoconiosis, but of usual interstitial pneumoconiosis caused by smoking.

The regulations mandate that one must consider the "relationship between the miner and any treating physician whose report is admitted into the record." 20 C.F.R. § 718.104(d). The opinion of a doctor who was the miner's treating physician is entitled to more weight than the opinions of other doctors. 20 C.F.R. § 718.104(d)(1). Dr. Moss was the miner's treating physician. He treated Mr. Winston approximately twice a year from 1989 until his death in 2004. Dr. Moss' opinion is that Mr. Winston suffered from interstitial pulmonary fibrosis as the result of his pneumoconiosis, arising out of coal mine dust exposure. He based this finding upon chest x-rays from as early as 1993 which showed fibrosis, as well as a reduced diffusing capacity. Dr. Moss stated that Mr. Winston first complained to him of dyspnea in 1996. Dr. Moss stated that Mr. Winston suffered from a progressive lung disease with severe hypoxemia, as evidenced in a 2002 ABG test in which Mr. Winston's pO₂ fell from 69.9 to 56 with exercise. By January 2004, Mr. Winston's pO₂ at rest was 52.7. Dr. Moss' opinion that Mr. Winston was totally disabled due to pneumoconiosis arising out of coal mine employment is adequately supported by medical evidence.

A miner must show that his pneumoconiosis was a substantially contributing cause of his totally disabling respiratory or pulmonary impairment. Section 718.204(c)(1); Bonessa v. United States Steel Corp., 884 F.2d 726 (3d Cir. 1989). Mr. Winston has shown that pneumoconiosis was a substantially contributing cause of his disability through the medical opinions of Dr. Moss and Dr. Cohen.

(4) Death due to pneumoconiosis

Benefits are provided for the survivors of miners whose death was due to pneumoconiosis. Death due to pneumoconiosis may be established under § 718.205(c) by showing any one of the following criteria:

- (1) Competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
- (2) Evidence that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
- (3) Under § 718.304, the miner suffered from a chronic dust disease of the lung and chest x-ray evidence shows one or more large opacities (greater than 1 centimeter), biopsy or autopsy shows massive lesions in the lung, or other evidence (in accord with acceptable medical procedures) show a condition which could reasonably be expected to yield such large opacities or massive lesions.

Section § 718.205(c)(5) provides that pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death.

Two doctors, Dr. Cohen and Dr. Moss, stated that the miner's death was hastened and caused by his coal worker's pneumoconiosis. Dr. Moss stated that the worsening pulmonary disease caused Mr. Winston's respiratory failure. Dr. Bailey found that the cause of death was respiratory failure complicated by UIP and COPD. However, he felt this was unrelated to coal dust exposure. Dr. Bailey stated, though, that "[D]ust exposure could clearly have aggravated his COPD ..." and then "It was really his fibrotic lung disease that killed him, and I think the COPD had a contributing factor." (T 119). If coal dust exacerbated the miner's COPD and COPD was a contributing factor in the miner's death, then Claimant has established that the miner's death was caused by pneumoconiosis.

I find that the bulk of the evidence supports a finding that coal worker's pneumoconiosis was a substantial contributor in the miner's death. Mr. Winston worked in a coal mine for 25 years. He suffered from a reduced diffusing capacity and dyspnea for approximately ten years before his death in June 2004. The miner established the existence of pneumoconiosis, and was entitled to the presumption that the disease arose out of his extensive coal mining employment history. While Dr. Bailey concluded that the miner had UIP, with smoking as the only risk factor. He also concluded that coal dust could have exacerbated the miner's COPD, and that COPD was a contributing cause of death. Drs. Cohen and Moss concluded that the miner had interstitial pulmonary fibrosis and relied upon evidence to show that this was caused by 25 plus years of exposure to coal dust. Both Drs. Cohen and Moss concluded that this was the cause of Mr. Winston's death.

Accordingly, I find that the Claimant has proven that Mr. Winston's death was caused by pneumoconiosis.

Entitlement

As Willie M. Winston, miner, and Claudette Winston, Claimant, have established total disability and death due to pneumoconiosis, they are entitled to benefits under the Act.

Benefits are to be paid in monthly increments, beginning with the first month in which a claimant satisfies all conditions of entitlement. 30 U.S.C. 932(d); 20 C.F.R. 725.203(a)(2000) and (2001). The miner, Mr. Winston, satisfied all conditions of entitlement as of December 10, 2002, the date of the first qualifying ABG test, which Dr. Moss stated in his report is the date when the miner was rendered totally disabled from returning to coal mine employment.

A surviving spouse is entitled to benefits for each month beginning with the first month in which all of the conditions of entitlement prescribed in §725.212 are satisfied. The Claimant, Claudette Winston, satisfied all conditions of entitlement as of June 21, 2004, the date of her husband's death.

ATTORNEY'S FEE

No award of an attorney's fee for services to Claimant is made herein because no application for fees has been made by Claimant's counsel. Thirty (30) days is hereby granted to counsel for the submission of an application for fees conforming to the requirements of 20 C.F.R. 4,6 §725.365 and §725.320 of the regulations. A service sheet showing service has been made to all the parties, including the Claimant, must accompany the application. Parties have ten (10) days following receipt of such application to file any objections. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

Accordingly, the Employer or Director shall:

- (1) Pay all benefits to which the miner is entitled under the Act commencing as of December 10, 2002.
- (2) Pay all benefits to which the Claimant is entitled under the Act commencing as of June 21, 2004.
- (3) Pay Claimant's attorney, Thomas E. Johnson, Esquire, fees and expenses to be established in a supplemental decision and order.

A

PAUL H. TEITLER
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Donald S. Shire, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).